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**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
| | ) | |
| Promotion of Competitive Networks in Local Telecommunications Markets | ) | WT Docket No. 99-217 |
| | ) | |
| Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed To Provide Fixed Wireless Services | ) | |
| | ) | |
| Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory And/Or Excessive Taxes and Assessments | ) | |
| | ) | |
| Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 | ) | CC Docket No. 96-98 |



## COMMENTS OF THE ELECTRIC UTILITIES COALITION

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Dated: August 27, 1999

## Executive Summary

In this proceeding the Electric Utility Coalition ("Coalition") urges the Commission to delay any further action in this proceeding until it completes setting rates for mandatory attachments to utility property for the 1996 to 2001 time period. The Coalition also urges that it is not timely for the Commission to undertake consideration of the issues and changes proposed in this proceeding until the Eleventh Circuit has had the opportunity to rule upon both the constitutional challenge to the statute, and the appeal of the Commission's post-2001 rules.

The Coalition also believes that the Commission does not have the authority, under the statute, to expand the scope of its mandatory protections beyond those appearing on the face of the statute. Any time the right of eminent domain is invoked, statutes and agency powers should be read narrowly to avoid the implication of constitutionally protected interests, if possible. In addition, the Commission should avoid forcing mandatory attachments on private property owners, which power it does not have, by exerting control over electric utilities. The Commission should avoid creating new powers for itself by requiring utilities to obtain rights of ways from private landowners which the Commission itself cannot mandate.

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## COMMENTS OF THE ELECTRIC UTILITIES COALITION

The Electric Utilities Coalition[1] ("the Coalition"), by counsel, and pursuant to a Notice of Proposed Rulemaking and Notice of Inquiry adopted by the Commission and released on July 7, 1999,[2] hereby submits its comments in the above-captioned proceeding.

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[1] The Coalition consists of a group of electric utilities which own poles, conduits, and rights-of-way, and which have participated as members of the Coalition in previous proceedings before the Commission and in appellate proceedings before the U.S. Court of Appeals for the Eleventh Circuit.

## I. INTRODUCTION

The Coalition consists of electric utilities that have actively participated in proceedings in which the Commission has attempted to establish mechanisms for the setting of the maximum rates that may be charged by utilities for access to their poles, conduits, and rights of way. In the current proceeding, the Commission proposes rule and policy changes designed to further promote competition in the telecommunications industry by expanding the attachment rights of competitive telecommunications service providers.

The Commission's action is premature, however, as it has not finished the basic task of setting the maximum rates that may be charged for a taking caused by pole attachments. The Commission's action is also premature because the underlying statutory provisions of Section 224, and the rules promulgated by the Commission in CS Docket No. 97-151, are currently subject to challenge in the Eleventh Circuit.[3]

The Commission's proposed action also exceeds its statutory authority and violates basic constitutional principles by proposing further mandatory takings not authorized by Congress and by failing to address critical compensation issues that must be a part of any takings discussion. The Commission has taken only preliminary steps in examining compensation issues, and has not even begun the task of determining who would be compensated under the new proposals, or the level of compensation that would apply.

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[2] *Promotion of Competitive Networks in Local Telecommunications Markets and Implementation of Local Competition Provisions in the Telecommunications Act of 1996*, WT Docket No. 99-217 and CC Docket No. 96-98, Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98 (released July 7, 1999).

Accordingly, the Coalition requests that the Commission hold this proceeding in abeyance until it has resolved issues still pending in CS Docket No. 97-98, and the Eleventh Circuit has had an opportunity to rule on the two controlling cases that are pending before it.

## II. BACKGROUND

In 1996 Congress adopted amendments to Section 224 of the Communications Act of 1934, as amended, 47 U.S.C. § 224. The amendments to Section 224 are the subject of a challenge mounted by a number of electric utilities in *Gulf Power et al. v. Federal Communications Comm'n*, 998 F.Supp. 1386 (N.D. Fla. 1998) (*Gulf Power I*). The federal district court in that case determined that Section 224 constituted a mandatory *per se* taking that implicated the just compensation requirements of the Fifth Amendment of the United States Constitution.[4] The court determined that it does not violate the Fifth Amendment for the Commission to set the reasonable compensation for the taking. According to the court, any rate set by the Commission would be subject to review by the courts of appeal, satisfying the pole owners' Fifth Amendment due process rights. The court's holding is on appeal in the Eleventh Circuit. The case has been argued and is awaiting an opinion.

The Commission also has instituted three rule making proceedings, prior to the instant proceeding, to effectuate the provisions of Section 224. The Commission implemented the

[3] A challenge to the constitutionality of Section 224 is pending in Case No. 98-2403. An appeal of the Commission's rules is pending in Case No. 98-6222.

[4] U.S. Const. amend. V.

mandatory access portions of Section 224 in the *Local Competition Order*[5] in CC Docket No. 96-98 which was appealed to the Supreme Court[6] and is now on remand in the Eighth Circuit. In the *Local Competition Order,* the Commission set forth the general terms and conditions for mandatory access to utility poles, conduits, and rights of way. WinStar Communications, Inc. filed a Petition for Clarification or Reconsideration of the *Local Competition Order* which helped to prompt the Commission's commencement of this proceeding.[7]

Subsequently, the Commission began an examination of the maximum just and reasonable rates that could be charged by utilities, during the time period from enactment of the amendments to Section 224 through 2001, in CS Docket No. 97-98 ("*Maximum Rate Proceeding*").[8] The Commission has not yet issued an order in the *Maximum Rate Proceeding.* While the Commission acted in the *Local Competition Order* to guarantee access to utility property, the Commission failed to provide any guidance regarding the maximum just and reasonable rate or constitutionally required compensation to be paid to utilities for any taking that has occurred since 1996.

The Commission then commenced another proceeding, CS Docket No. 97-151, to establish formulas for the determination of the maximum just and reasonable rates for pole

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[5] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996) ("*Local Access Order*").

[6] *AT&T Corp. et al. v. Iowa Utilities Board et al.,* 119 S.Ct. 721 (1999).

[7] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, WinStar Communications, Inc. Petition for Clarification or Reconsideration (filed Sept. 30, 1996).

[8] *Amendment of Rules and Policies Governing Pole Attachments*, CS Docket No. 97-98, Notice of Proposed Rulemaking, 12 FCC Rcd 7449 (1997).

attachment rates for telecommunications attachments after 2001. The Order issued in that proceeding is also the subject of an appeal in the Eleventh Circuit.[9] The constitutionality and statutory permissibility of the Commission's rate formulas and assumptions, as well as its expansion of the applicability of Section 224 to dark fiber, Internet applications, and wireless attachments are also subjects of that appeal.

## III. THE COMMISSION'S ACTIONS WERE PREMATURE

The courts are still reviewing the constitutionality of Section 224 and the Commission's rules, the scope of the Commission's statutory authority to prescribe rules, and the meaning of the rules. With these fundamental issues unresolved, the Commission now delves into the complicated arena of rooftop attachments and access to rights-of-way owned or controlled by utilities.

Compounding the present uncertainty and inadvisability of plunging ahead into a new set of issues is the fact that the Commission has never set the rates that utilities are entitled to charge attachers for attachments as far back as 1996. Congress, in adopting the 1996 amendments to Section 224, recognized that it was expanding the scope of Section 224, and making access mandatory.[10] As a result, Congress placed specific requirements on the Commission to adopt rules and revised pricing structures on an expedited basis. In light of the constitutional

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[9] *Gulf Power, et. al v. Federal Communications Commission*, Case No. 98-6222 (*Gulf Power II*).

[10] By mandating access to a utility's poles, Congress effected a material change in the operation and constitutionality of Section 224. *See, Federal Communications Commission et al. v. Florida Power Corp. et al.*, 480 U.S. 245, 251 n.6 (1987).

implications of mandatory access, the Commission should focus on providing just compensation to pole owners prior to expanding the scope of the mandatory access provisions of Section 224.

## IV. WIRELESS ATTACHMENTS

The Commission has been energetic in assisting the development of the wireless telecommunications market, as evidenced by its current proposal to expand mandatory access to include access for wireless carriers. The Commission is conducting this proceeding in response to WinStar's Petition. The Coalition supports the Commission's efforts to promote a competitive and robust wireless communications industry, but we strongly urge the Commission not to pursue such a course by allowing subsidized access to utility property. Congress provided assistance to wireless communications service providers with section 704 of the Act.[11] Section 704 made federal property available for the location of transmission facilities and encouraged the states to make governmental property available for antenna siting. Section 704 enlists federal agencies, courts, and the states to assist wireless carriers in the building of their networks.

Wireless communications service providers do not face the same challenges as wireline carriers whose basic infrastructure is owned by a limited number of parties. Many entities own communications transmission towers. Broadcast stations, cellular service providers, and other entities own communications transmission towers. The towers are generally available, at negotiated rental rates, to wireless communication service providers. Rooftop antenna placement is likewise generally available, at market rates. Numerous companies specialize in managing and renting tower and rooftop access to various wireless communications providers.

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[11] Telecommunications Act of 1996 § 704, Pub. L. No. 104-104, 110 Stat. 56, 151-52 (1996).

The Commission's actions regarding mandatory access have caused dislocations in existing markets for antenna rentals, and the Commission's current proposals threaten to disrupt the market for rooftop rentals by allowing access under Section 224. The Coalition believes that Congress intended only to provide access to long runs of pole and conduit paths, and that the Commission's new expansive view of its mandate has no basis in Section 224.

## V. ACCESS TO A UTILITY'S CORPORATE OFFICE BUILDINGS

The Coalition agrees with the Commission's tentative conclusion that Section 224 does not confer a general right of access to all property owned or controlled by a utility, including its corporate offices. Expanding Section 224 to apply to every piece of property belonging to a utility would exceed the plain language of the statute. In a challenge to Section 224, a federal court has ruled that attachments to utility property constitute a taking for which there must be reasonable compensation.[12] When a statute effects a taking, the statute should be construed narrowly in order to avoid excessive takings and substantial constitutional difficulties.[13] Applying the rule of narrow construction to Section 224 limits attachment privileges to "poles, ducts, conduits, or rights-of-way" owned or controlled by a utility. Any reasonable reading of Section 224 must compel a conclusion that attachment privileges do not extend to a utility's office buildings or non-wire carrying facilities.

The Coalition disagrees with the Commission's expansion of the definition of a right-of-way to include all land a utility owns and uses as part of its distribution network. The

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[12] *Gulf Power et al. v. Federal Communications Comm'n*, 998 F.Supp. 1386 (N.D.Fla. 1998).

Commission proposes to effectuate the pro-competitive intent of the statute by defining right-of-way as land used for a right-of-way. This differs from the traditional property law definition of a right-of-way, the right to use the property of another. The Commission's proposed definition would open a utility's entire distribution network to attachment. The Commission would allow attachments when a utility uses its own property in the same manner it would use the property of an unrelated private landowner.

If the Commission were to grant access to a utility company's rooftops, then there would have to be determinations of the just and reasonable rates to compensate the utility for the use of its property. Attachment to various equipment on a rooftop is not amenable to the uniform rate formulas established by the Commission for attachment to poles. Indeed, the Commission is in no position to set compensation formulas that will do substantial justice to the utilities and the attaching parties. Compensation arrangements belong at the state level for handling on a case-by-case basis.

## VI. CONDUIT

The Commission tentatively concludes that Section 224 attachment privileges should extend to in-building conduit because conduit could reasonably be interpreted as a right-of-way when placed inside someone's building. For Section 224 to apply to in-building conduit, the Commission would have to amend the definition of conduit beyond "pipe placed in the ground." Extending the definition of conduit to include in-building material would lead to untenable practical consequences.

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[13] *Bell Atlantic Tel. Co. v. Federal Communications Comm'n*, 24 F.3d 1441, 1445 (D.C. Cir. 1994).

Anyone who travels the streets of any metropolitan area can attest to the disruption caused by numerous telecommunications service providers gaining access to in-ground wiring. While there may be space to allow attachments to in-ground wiring, the process is not practical. Allowing attachments to in-building wiring would only involve greater technical difficulties. When utilities installed in-building conduit, they employed minimal amounts of space in order to preserve the building's structural integrity. There is little, if any, space for attaching parties to "piggyback" onto the portion of a utility's network that is in-building. Attachment to in-building conduit is impractical, if not impossible. Expansion of the definition of "conduit" would impart almost no benefit to attaching parties and would lead to many negative consequences, such as current inductance, shock hazard, and interference. The Commission should therefore abandon its proposal to amend the definition of "conduit."

Conduit is another category of utility equipment that is not susceptible to uniform compensation formulas. It is much more difficult to conceptualize the usable space in conduit than it is to identify the usable space on a pole. While there are clear rules for what portions of a pole cannot be used for support or safety reasons, no such rules exist for conduit. For these reasons, establishing compensation and attachment safety standards must involve different considerations than the factors that are relevant to poles. The Coalition suggests that the Commission adopt a rule providing that the conduit compensation standard will be the current replacement costs of the conduit. The replacement costs of the usable space would be the retail costs of the ducting, the only usable portion of the conduit. The cost of the duct would then be deducted from the total cost of the conduit to determine the cost of the unusable space and to calculate the maximum rate under section 224.

## VII. EFFECTS ON UNDERLYING PROPERTY OWNERS

The Commission properly considers the impact of expanded rooftop access on the owners of the underlying property. The Commission faces a difficult task in seeking to promote competition in the local exchange marketplace while also recognizing and protecting the interests of private landowners. When the utilities first built on private property, they acquired access either through eminent domain or private agreement. With eminent domain, the property owner ceded rights without his or her consent. With private agreement, the property owner ceded limited rights for negotiated compensation. Even though the property owner agrees to allow a utility to build on the owner's property, the owner does not necessarily agree to allow all interested parties to build on the property.

The Commission seeks comment on how it can regulate access by telecommunications carriers to multiple-tenant buildings. The Commission makes clear in the Notice that it has doubts about its authority over the building owners who must allow access to additional attaching entities. The Commission does have authority over utilities who already have limited access to the buildings. By forcing the utilities to expand the rights-of-way they have acquired from the property owners, they are causing the utilities to take additional property from the owners. Someone must pay reasonable compensation to the owner for the taking. The Commission acknowledges the potential difficulties arising from the expansion of attachment rights and seeks comment thereon. The Commission should develop an extensive record to assure itself of its proper authority before it forges into new areas of property and constitutional law.

The Commission seeks comment regarding the circumstances in which a utility should be considered to "control" a right-of-way. The Commission proposes that a utility can "control" a

right-of-way when (1) a utility places distribution facilities on property with the agreement of the owner; (2) a utility obtains the right from a property owner to place distribution facilities on the property; or, (3) a utility takes other action, like exercise of eminent domain, to secure a right to place distribution facilities on the property.

WinStar proposes that a utility may "control" a right-of-way even if the utility does not use the right-of-way for its distribution facilities. WinStar essentially proposes the following scenario—(1) a utility and a property owner establish an agreement whereby the utility could use the owner's property; (2) for whatever reason, the utility never locates any of its facilities or equipment on the owner's property; (3) a telecommunications service provider requests attachments that will pass over or occupy the owner's property; (4) even though the utility has never constructed on the property, the utility and the property owner would have to allow access to the telecommunications service provider to run its network across the owner's property.

WinStar's proposal contradicts Section 224 and the Commission's intent in implementing the statute. A utility must allow attachment under Section 224 when it uses any property that it owns or controls for wire communications. When the utility does not use the right-of-way and cannot use the property for wire communications, that property is no longer subject to Section 224.

## VIII. MEASUREMENT AND EXPANSION OF RIGHTS-OF-WAY

The Commission seeks comment on methods to measure the extent of a utility's right-of-way. In some situations, a utility may contract with a property owner for a certain amount of space on a rooftop and proceed to use all of that space. In other instances, the agreement

between the parties may include the right to use the rooftop but no definition of the amount of space the utility may use.

The Commission requires utilities to expand their rights-of-way acquired by eminent domain in order to accommodate additional requests for attachment. This requires further condemnation and injury to the property owner. A similar principle cannot apply to situations where the right-of-way is acquired by private agreement. The Commission would force the utility and the property owner to negotiate for additional access to the property. The utility would be in a position of having to accept almost any terms and conditions from the property owner in order to satisfy the utility's obligations under Section 224. The property owner, once he has any agreement with the utility, would be forced to grant further access against his will.

Section 224 does not authorize the taking of private non-utility property. In the absence of Commission coercion, utilities may negotiate with property owners for additional rights, or parties seeking attachment could negotiate with the underlying property owner. The Commission should avoid forcing utilities to obtain rights that the Commission itself does not have the authority to expropriate.

## IX. COMMISSION AUTHORITY

The scope of a right-of-way is a matter of property law and should be left to the determination of the states without federal guidance. The Commission should not create a federal common law of property. The Commission would be exceeding its authority with such action. The Commission would also exceed its authority in creating a national nondiscriminatory access requirement. Even in the face of constitutional concerns, however, the Commission reads

Section 224 broadly. The breadth of the Commission's interpretation of Section 224 is inappropriate and unauthorized.

## X. RECIPROCAL ACCESS TO ANTENNAS AND WIRELESS CARRIER'S PROPERTY

In the event that the Commission determines that it has the statutory and constitutional authority to expand mandatory attachment rights, and that it is in the public interest to do so, the Commission should make the expansion of such rights reciprocal. As the Coalition has argued in prior cases, and argument can be made that wireless attachers and competitive communications providers are also public utilities within the definition contained in Section 224. Many of these providers are constructing their own conduit and assembling their own rights of way. It would be consistent with the Commission's expansive interpretation of the scope of Section 224 to extend attachment rights to the facilities of these service providers, as well. If the Commission undertakes the expansion contemplated in this document, the Coalition suggests that the expansion be made reciprocal, with attachment rights being extended to the facilities of all service providers.

## XI. PRACTICAL AND CONSTITUTIONAL CONSIDERATIONS WITH EXPANDING SECTION 224

The Commission properly acknowledges there are practical and constitutional issues implicated in the expansion of attachment under Section 224. If the Commission allows attachments on a utility's rooftop, there will be myriad practical and technical problems with providing access. There are safety, scheduling, and administrative costs involved with allowing access to other parties that the Commission does not properly consider.

The NESC rules that apply to pole attachments also apply to attachments in the rooftop and multiple-tenant environments. The purpose of the NESC rules is to safeguard persons during the installation, operation or maintenance of electric supply and communications lines and associated equipment. NESC § 1.010. These rules cover electric supply and communications lines, equipment, and associated work practices employed by electric, communications, or similar utilities, or railways, whether they be public or private, in the exercise of their function as utilities. NESC § 1.011. All electric supply and communications lines and equipment must be designed, constructed, operated, and maintained to meet the requirements of the rules. NESC § 1.012. In order to comply with the NESC rules and ensure the safety of workers on the rooftops, as well as the occupants of the buildings, there must be standards and limits governing attachments to rooftop and in-building facilities.

The same considerations apply when the Commission forces private landowners to allow additional attaching parties onto their property. The additional temporary intrusions will be more than bargained for by private landowners. Permanent physical occupation of the owner's property with additional equipment is properly regarded as a taking for which there should be reasonable compensation. The determination and allocation of reasonable compensation among the utility and the attaching parties is not a simple matter. The threat of litigation from additional takings also increases the costs to the utilities, and probably to the Commission, as well, as it would have to defend the constitutionality of its new regulations.

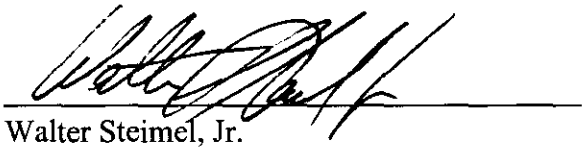
## XII. CONCLUSION

With Section 224, Congress and the Commission have attempted to expand competition in the telecommunications industry by allowing new providers to use facilities owned or

controlled by incumbent local exchange carriers and utilities. The Commission has been slow in promulgating the rules necessary for fair pole attachments. Rules that have been issued are subject to appeals in federal courts. The Commission pays no attention to Section 224's unsteady implementation and now seeks to allow access to rooftops and rights-of-way in order to enhance competition, especially in wireless services. The expansion will involve additional takings of utility property and property of private non-utility building owners. The Commission needs to consider the constitutional implications of mandatory access under Section 224 and focus on providing just compensation to pole owners before it expands the scope of Section 224.

Respectfully submitted,

THE ELECTRIC UTILITIES COALITION



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